BRIEF IN SUPPORT OF PETITION

Opinions Below

The United States District Court, Southern District of New York, revoked petitioner's probation and his original sentence, execution of which had been suspended, on October 9, 1939, PR, p. 261, with an opinion, p. 201.

The United States Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court on August 12, 1940, with an opinion, PR, pp. 299-303.

Jurisdiction

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and the Act of February 24, 1933, as amended by the Act of March 8, 1934.

Statutes Involved

Sections 1 and 2 of the Probation Act of March 4, 1925, being Sections 724 and 725 of title 18 of the U. S. Code, are printed as an appendix hereto.

Statement

The facts are set forth under the title "statement" in the petition for certiorari at page 2, *ante.*

Argument

In its opinion in *U. S.* v. *Van Riper,* 99 F. (2) 816, 817, the court below found "The Complaint resulting in the revocation of his (petitioner's) probation did not emanate from the probation officer but from the immigration authorities.

A glance at the "Affidavit for Order of Arrest" herein (f. 70) will show that it, too, could have emanated from no source but the immigration authorities.

In *Escoe* v. *Zerbst*, 295 U. S. 490, 493, this Court said:

> "Clearly the end and aim of an appearance before the Court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake *or even downright malice.* He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns* v. *U. S., supra* (287 U. S. 216), at pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. *Burns* v. *U. S., supra.* This much is necessary, or so Congress must have thought, *to protect the individual against malice or oppression.*" (Our italics.)

While a practicing lawyer in good standing petitioner had many litigations with the immigration authorities. There is a great mass of testimony, which neither court below has seeen fit to comment upon except in the most casual manner, and an analysis of same shows that there is absolutely no evidence to support the judgment herein. It also may be fairly inferred from the evidence that petitioner has been the victim of malice and oppression on the part of the immigration authorities.

As the evidence shows, all of petitioner's alleged acts would have been deemed proper and in the regular course of business if they had been done by steamship agents or lawyers engaged in the immigration field. In fact, neither court below expressed any criticism of the acts of Mangiaracina, Henderson, Miss Faians, Stewart, Reid or any other person involved in the transactions. Both the State and the Labor Departments, after most searching investiga-

tions, had found all of the aliens involved to be persons of good character, fully eligible for admission into the United States as immigrants, and petitioner had dealt with them honorably.

POINT I

Charges 1 to 5, inclusive, are res judicata under U. S. v. Van Riper, 99 F. (2d) 816.

Charges 1 to 5, inclusive, were fully heard in a prior proceeding before Judge Hulbert and on appeal his order sustaining the charges and revoking petitioner's probation was reversed. No application for certiorari was made, the time therefor has expired and that decision of the court below stands as the law of the case as to these charges.

POINT II

Charges 6, 7, 8 and 9, inclusive, are not supported by any credible evidence, and they relate to matters subsequent to June 29, 1937, when the conditions of probation ceased to have force and effect.

As to charge 6, Judge Knox, without foundation therefor in the record, arbitrarily undertook to say that petitioner had "lied", not before Judge Knox in these proceedings, but in March, 1938 in the proceedings before Judge Hulbert which resulted in petitioner's vindication by the court below, 99 F. (2) 816.

The record in neither proceeding sustains the finding of Judge Knox.

Petitioner's period of probation, and its conditions, terminated June 29, 1937. He did not lie before Judge Hulbert in 1938, but if he had done so his act would not have constituted a violation of the conditions of probation, because they had previously terminated and had no further force and effect. Such act would have been "perjury" and petitioner, similarly to every other individual, would have been subject to indictment and trial by jury.

As to charge 7, the government neither showed nor attempted to show that there was any irregularity, impropriety or illegality connected with any matter wherein petitioner rendered occasional assistance to Goldsmith's secretary in his absence. The New York State courts had found Goldsmith's business a lawful and not a criminal one and petitioner would have had a right to associate himself in that business had he seen fit to do so. Especially is this so in the light of the fact that the matters occurred after June 29, 1937, when petitioner's conditions of probation ceased to have force and effect.

As to charge 8, our foregoing statement of facts is pregnant with evidence and logic that Sylvia and Esther Rosenberg were by their own admissions criminals and perjurers and that instead of finding "no reason to doubt" their testimony, Judge Knox should have disregarded it entirely and taken steps to see that they were brought to bar for their wrong-doing. Their testimony lacked corroboration, *U. S.* v. *Isaacson,* 59 F. (2) 966. The Rosenberg matter also transpired long after June 29, 1937, the termination of the probation period.

As to charge 9, same is attempted to be sustained by the uncorroborated testimony of Miss Faians that appellant told her he had gone to Toronto. No witness or document sustains her in this statement. On the contrary, in an attempt to sustain this charge, the Government produced Exhibit 1 (improperly admitted in evidence) which corroborates petitioner and shows that he did not go into Canada but stopped at Buffalo. Furthermore, petitioner denied that he had gone into Canada, that he had "said" to Miss Faians that he had gone into Canada and that he had done anything other than to take Caraciollo to a relief worker in Buffalo and leave him there.

As shown, the Government offered in evidence over petitioner's objection and Judge Knox improperly took into consideration Exhibits 1 and 2 in rendering his opinion herein. These documents were created in ex parte proceedings at which petitioner was not present and, hence, the objection to their admission should have been sustained. Apparently no attempt was made by the Government to call as a witness Caraciollo, the man who signed and swore to the affidavit, Exhibit 1. Petitioner is not mentioned in Exhibit 2. Petitioner therefore was deprived of all benefit of cross examination. See *U. S.* v. *Svarney*, 7 F. (2) 515. Also *U. S.* v. *Van Riper*, 99 F. (2) 816, in which it was said:

> "While a probationer is not entitled to a formal trial, he is entitled to a hearing and to have the conclusions upon which the court acts based upon relevant proven facts. The decision must not rest upon whim or caprice, or suspicion of conduct not proven. *Escoe* v. *Zerbst*, 295 U. S. 490; *Burns* v. *U. S.*, 287 U. S. 216, 222; *Campbell* v. *Aderholt*, 36 F. (2) 366, 367."

The objection was duly taken (ff. 142-146) and Judge Knox left these exhibits as marked for "Identification". Throughout the hearing it was properly assumed by petitioner that they were not in evidence, and for this reason made no attempt to controvert them. At folio 427 Judge Knox merely stated "I will take them subject to passing on their validity", and his opinion indicates that *after the hearing* he reached the conclusion that they were "evidence" and so considered them. Thereupon it became important that petitioner overcome any improper inferences that might be created by said exhibits and on lengthy, convincing papers and exhibits (pp. 204-248) he moved to reopen the hearing so as to produce documentary evidence and living witnesses having no interest in or connection with these proceedings (Mr. Reynolds of the Bar Association and officials of the Immigrant Industrial Savings Institution and their documents) to show that the contention of Miss Faians was not founded in truth, that Caracciolo's difficulties arose in the main from her misuse of his funds,

etc. Said moving papers and exhibits show not only that Miss Faians' testimony was untrue but also that she had ample motives for misstating facts. In part because of her handling of the funds and other details of the Caracciolo case, and for other reasons not connected with petitioner, charges of misconduct had been presented against Miss Faians to the Bar Association. She took the path of least resistance.

Had these proceedings been a formal trial, it would have been a gross abuse of discretion for Judge Knox to deny a motion to reopen and continue same prior to entry of judgment. Under the above-quoted rule in *U. S.* v. *Van Riper,* we believe it was equally an abuse of discretion and unfair to have denied the motion in the instant proceedings.

Further, the Caracciolo matter transpired after June 29, 1937, when the probation conditions ceased to have force and effect, and could not have constituted violation of probation.

If the government officials believed a crime had been committed they should have caused the indictment of petitioner and any other person connected therewith.

POINT III

The District Court had no jurisdiction in May, 1939, to make an order and warrant for petitioner's arrest, because both the probation period and the imposed sentence, execution of which was suspended, had previously terminated under the express provisions of the sentence and the statute.

In its opinion herein, PR, p. 299, the Circuit Court of Appeals found that petitioner:

> "Was not arrested, however, during the original probationary period but was arrested and given his hearing within the period for which he might have originally been sentenced."

This does not accord with the facts. On June 30, 1932 Judge Knox definitely imposed eight concurrent five year sentences under counts 9 to 16, inclusive, of the indictment, to commence at expiration of service of sentences imposed on counts 1 to 8, inclusive, and 17, suspended execution thereof, and provided that the sentence was "to date from June 30, 1932," PR, pp. 9-10. As an imposed sentence it was a final judgment and constituted the sole, specific and maximum penalty that ever could be exacted from petitioner under said counts,—it was, in the language of the probation statute, "the maximum period for which the defendant might originally have been sentenced" in the judgment of the sentencing court. The probation period terminated June 29, 1937, and the sentence, execution of which was suspended, terminated by lapse of time on or before August 28, 1938, as hereinafter shown. Therefore, on May 6th and 8th, 1939, respectively, the District Court had no power to make an order and warrant for petitioner's arrest, because Section 725 of Title 18, U. S. Code limits that power to the probation period and

> "Any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced."

Most certainly said "maximum period" is not to be determined by aggregating the penalties possible under the several counts of an indictment,—a defendant is not sentenced under the indictment but under the judgment of conviction, the sentence. In imposing sentence, final judgment, the trial judge once and for all time evaluates the gravity of the offenses charged in the indictment and determines the maximum degree of punishment to be exacted therefor.

The opinion of the court below, PR, p. 299, also states:

> "It has been argued that the court was without power to vacate the suspension of execution of the original sentence after the period of probation had expired and to resentence, but that contention is unsound for the reasons stated in *U. S.* v. *Moore,* 101 F. (2) 56."

Petitioner did not so argue. He argued that both the period of probation and the period of the sentence, execution of which had been suspended, had terminated by their express terms and those of the statute, and that, therefore, there remained no sentence which the court had jurisdiction to put into execution by vacating its suspension. Most certainly it could not vacate the originally *imposed* sentence, a final judgment, and impose a new one, because its court term long since had expired, *Berman* v. *U. S.,* 302 U. S. 210, 212; *U. S.* v. *Mayer,* 235 U. S. 55. We need not discuss *U. S.* v. *Moore,* 101 F. (2) 56, cited by the court below, because that case looks for its authority directly to the decision of this Court in *Frad* v. *Kelly,* 302 U. S. 312.

Frad v. *Kelly* is not in point, because it does not deal with a case like the one at bar in which the court imposed a definite sentence, a final judgment, and suspended its *execution.* In that case the court suspended *imposition* of sentence, as in *Miller* v. *Aderhold,* 288 U. S. 206.

The Frad case presented only two questions:

1. Whether or not, after returning to his own district, a Judge properly could act with respect to a case which had come before him in another district where he previously had sat by special designation?

Both this Court and the court below answered that question in the negative.

2. Whether or not a court could impose a sentence to be served under one indictment, suspend *imposition* of sentences under two other indictments, and impose probation?

Both this Court and the court below answered that question in the affirmative.

Nothing in the Frad case can be construed to mean that an imposed sentence, a final judgment, can be vacated and a new one imposed after the expiration of the term of court, or that placing the defendant on probation affects the finality of the judgment. In fact, in harmony with all other decisions of this Court on the subject, its Frad opinion contains the statement:

> "A criminal case is concluded by the judgment of sentence entered upon a plea or a verdict of guilt."

This Court decided the Frad case on December 6, 1937, and on the same day it decided *Berman* v. *U. S.*, 302 U. S. 210, 212, in which it held:

> "Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464. Here the imposition of sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill* v. *Wampler, supra*) but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits,' and 'leaves nothing to be done but to enforce by execution what has been determined' *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 280, 283; *Heike* v *United States,* 217 U. S. 423, 429.
> * * * Placing petitioner on probation did not affect the finality of the judgment."

Two months thereafter, in February, 1938, this Court decided *Cosman* v. *U. S.*, 303 U. S. 617. Cosman had been sentenced in July, 1935 to 14 months' imprisonment under one count of an indictment, to three concurrent sentences of two years each under three other counts of the same indictment, with execution suspended, and to two years probation.

After his release from imprisonment under said first count, Cosman was arrested November 7, 1936 for violation of his probation. The probation revocation hearing came on before Judge Caffey in the Southern District of New York on July 9, 1937 and was adjourned.

On December 16, 1937 it again came on before Judge Caffey, and Assistant U. S. Attorney Shears stated to the Court:

> "The case came on for hearing of the violation of probation on July 9th, and at that time the United States Attorney moved for sentence under the rule of the two cases of *United States* v. *Greenhaus,* 85 F. (2) 116, and 89 F. (2) 634. Counsel for the defendant * * * requested that the commitment be adjourned until December 9th, 1937, to await the ruling in the Supreme Court of the case of *Frad* v. *Kelly,* 89 F. (2) 866, certiorari granted June 1, 1937.
>
> Your Honor adjourned the commitment as requested * * *.
>
> On December 6, 1937, the Supreme Court decided the case of *Frad* v. *Kelly,* affirming the Circuit Court of Appeals for the Second Circuit. However, the opinion carefully refrained from mentioning *United States* v. *Greenhaus* * * *."[1]

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[1]In the *Frad* case, 89 F. (2) 866, May 10, 1937, affirmed by this Court, 302 U. S. 312, December 6, 1937, the Circuit Court of Appeals had said: "*United States* v. *Greenhaus,* 85 F. (2) 116, certiorari denied November 17, 1936, 57 S. Ct. 192, held that, where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at the termination of a prior one is unlawful, and hence an order of probation is invalid and execution of the sentence may be ordered. That rule does not apply to indictments which are separate and not consolidated."

"The Government must take the position, without more specific language as to the Greenhaus cases, that the Greenhaus case is binding upon this court, and upon the Government at this time in connection with this particular sentence. Consequently the Government renews its motion to recommit.

I will read exactly the Government's motion at this time: To vacate the suspension of execution of sentence and the probation imposed on counts two, three and four of indictment C. 97-11, and to order execution of the sentence heretofore imposed on the defendant, Nathan Cosman, of two years on each of these counts, to run concurrently, the defendant to be given credit on the execution of said sentence for two years for the time which elapsed between his release from the United States Penitentiary on June 8, 1936, and July 9, 1937, the stipulated date on which the commitment was to be considered effective. * * *

The Court: As I stated to you, I feel compelled by the ruling in the Greenhaus case to vacate the suspension of execution of the two year sentence that was imposed in this court on July 1, 1935, and probation of two years which accompanied that sentence. That forces me, therefore, to require the service of that sentence less credit of a period equal to that between June 8, 1936, and July 9, 1937. That would be less thirteen months and one day * * *."

On January 10, 1938, 94 F. (2) 1020, the Circuit Court of Appeals affirmed Judge Caffey's said order "on authority of *U. S.* v. *Greenhaus,* 85 F. (2) 116, certiorari denied 299 U. S. 596".

On February 7, 1938, *Cosman* v. *U. S.,* 303 U. S. 617, this Court reversed said decisions of the courts below:

"Per Curiam: The motion for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is also granted, and the judgment is reversed. Frad v. Kelly, 302 U. S. 312."

Thereby this Court held in effect that it was and is lawful for District Courts to impose sentences, final judgments, with execution suspended, to follow service of a sentence

under another count of the same indictment, as was done in the cases of Greenhaus, Berman, Cosman and this petitioner, which final judgments cannot be vacated after the expiration of the term of the court at which they are imposed, *U. S.* v. *Mayer,* 235 U. S. 55.

The Fourth Circuit Court of Appeals in *Birnbaum* v. *U. S.,* 107 F. (2) 885, 886, Dec. 2, 1939, states:

> "An order suspending sentence and releasing a prisoner on probation is in no sense a final decision. It is a mere deferring of sentence, which in a criminal case is the final judgment. * * * When the sentence is imposed and merely its execution suspended, there is a final judgment not subject to change by the court;"

The statute, 18 U. S. C. 724 specifically limits the period of probation, and the effectiveness of the conditions of probation, by stating that "The period of probation, together with any extension thereof, shall not exceed five years".

The next succeeding section, 18 U. S. C. 725, expressly provides that, for a violation of the conditions of probation, the probationer may be arrested at any time within the probation period or "at any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced".

Sections 724 and 725 of Title 18, U. S. C., are Sections 1 and 2 of the Act of March 4, 1925, c. 521, 43 Stat. 1259-60. As parts of the same act they must be read and construed together and in harmony with each other. Therefore, under 18 U. S. C. 725, in a timely proceeding, the Court has power:

> (If imposition of sentence was suspended) "to revoke the * * * suspension of sentence, and may impose any sentence which might originally have been imposed." *Miller* v. *Aderhold,* 288 U. S. 206.
>
> (If execution of an *imposed* sentence was suspended) "to revoke the probation" and, under *Berman* v. *U. S., supra,* automatically " 'enforce by execution' the said *imposed* sentence, execution of which was suspended."

In other words, while Section 725 gives the court power to revoke "probation" OR the "suspension of sentence", nothing in said section gives it power *to vacate an imposed sentence, a final judgment, and impose a new one.* In the instant case both the five year term of the imposed sentence, and the maximum five year period of probation, had terminated long prior to the institution of this proceeding on May 6, 1939, as aforesaid, and there remained no sentence which could be executed.

POINT IV

Under the sentence of June 30, 1932, the period of probation ended June 29, 1937, and the imposed sentence, execution of which was suspended, ended August 28, 1938.

On December 4, 1916 in *Ex Parte United States,* 242 U. S. 27, this Court condemned indefinite suspension of sentences, held that District Courts had no power to suspend the imposition or execution of sentences, and that they could have no such power unless and until Congress should grant same by legislation.

March 4, 1925 Congress enacted the Probation Act, 18 U. S. C. 724-725.

January 3, 1928 this Court in *U. S.* v. *Murray,* 275 U. S. 347, held that probation could not be imposed to follow incarceration, on the theory that the incarceration would defeat the purposes of the Probation Act, *i. e.,* to keep first offenders from contacting hardened criminals.

June 20, 1932, just prior to petitioner's sentence by Judge Knox, the Ninth Circuit Court of Appeals decided *Burns* v. *U. S.,* 59 F. (2) 721 (affirmed 287 U. S. 216), and upheld a sentence of one year on one count, a fine on a second count and a five year sentence with execution suspended on a third count, with probation to run during and beyond the imprisonment under the first count.

June 30, 1932, the District Court, Knox, J., sentenced petitioner (ff. 25-29):

> "Count one to eight inclusive—Three years on each count to run concurrently. Count 17—Two years to run concurrently with counts one to eight, inc. Counts nine to sixteen—Five years on each count to run concurrently and to commence at the expiration of sentences imposed on counts 1 to 8 inclusive and count 17. Sentence on counts 9 to 16, inc. suspended. Defendant placed on probation for a period of five years. Sentence to be executed at a penitentiary to be designated by the Attorney General. Atlanta, Ga. Sentence to date from June 30, 1932."

Thereby Judge Knox imposed a definite sentence under each and every count of the indictment, a final judgment. In stating that the sentence was from June 30, 1932 Judge Knox then intended to and did fully exhaust his powers under the applicable statutes, as he and every other District Judge then understood them, because it then was the general belief that *U. S.* v. *Murray, supra,* precluded sentence to a period of probation to follow a period of incarceration, even though *Burns* v. *U. S., supra,* countenanced probation running concurrently with and beyond imprisonment.

In other words, the probation period commenced June 30, 1932 and terminated June 29, 1937. The five year sentence, execution of which was suspended, commenced upon petitioner's release from incarceration August 29, 1933 and, at the latest, terminated August 28, 1938.

After the court below vindicated petitioner in 99 F. (2), 816, in which assigned error number seven claimed June 29, 1937 as the termination of the probation period (99 PR, f. 783), the Government on December 12, 1938 unsuccessfully attempted to procure from Judge Coxe an order:

> "that the probation of the defendant is reinstated and that he is placed on probation for the remainder of the probationary period ordered in his original sentence."

On March 31, 1939, Judge Hulbert duly

> "ORDERED, that the period of probation of the defendant Harold Van Riper having terminated, he is hereby discharged from any and all further supervision by the probation officer of this court."

The Government did not appeal from Judge Coxe's refusal to continue petitioner's probation or from Judge Hulbert's order formally terminating it and, hence, as the law of this case it is established that petitioner's probationary period was formally terminated June 29, 1937 by an order dated March 31, 1939 stating that same had expired prior to its date.

At no time in the instant proceedings, although the question was repeatedly raised, did Judge Knox question the fact that the probation period had terminated June 29, 1937. He rested for his authority to carry on the proceeding after the probation period had terminated solely on *Moore* v. *U. S.*, 101 F. (2) 56, and so stated, PR, f. 115, and, as shown, it is not in point.

In view of all the foregoing, there was no authority in the probation officer on May 6, 1939 to institute these proceedings.

POINT V

The indictment was invalid and the Court was without jurisdiction to impose judgment and sentence.

Immediately upon the opening of the hearing on June 6, 1939 petitioner challenged the Court's jurisdiction to proceed (PR, ff. 120-121), on the ground that indictment C-88-665, May 25, 1932, showed on its face that, in view of the provisions of the Naturalization Act of June 29, 1906, 8 U. S. C. 373, 379, 380 and 414, it was impossible that the offenses charged therein could have been committed at any time prior to the date of said indictment, May 25, 1932.

Said question was previously before the courts below in *U. S.* v. *Van Riper,* 92 F. (2) 1020, but inasmuch as it went to the jurisdiction of the court, a question always open, it was again raised. The District Court ignored it in its opinion herein (PR, ff. 603-606). The Court below did not rule that it was *res judicata,* but merely stated in its opinion (PR, p. 299), that the contention was unsound in view of *Latgis* v. *U. S.,* 97 F. (2) 588.

This Honorable Court denied certiorari, 58 S. Ct. 521, in *U. S.* v. *Van Riper,* 92 F. (2) 1020, and, in the absence of a ruling by it as to whether or not said question is *res judicata,* we merely refer to the record and briefs therein and point out that in the Latgis case the court did not have presented to it and consider the questions raised by petitioner. Also, that the penal and other provisions of the Naturalization Act of June 29, 1906, and similar provisions of earlier statutes had been in force more than a century prior to the Fried case of 1935, wherein the Government's brief stated:

> "It is true there is no reported case refuting the defendant's contention and sustaining the Government on the question at bar." (R92, f. 220.)

Conclusion

It is respectfully submitted that the petition should be granted as prayed for.

JOHN S. WISE, JR.,
Attorney for Petitioner,
135 West 16th Street,
New York, N. Y.